90-758

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

DAVID ENIX, JAMES MEHAFFIE, DAVID MEHAFFIE,
DOUGLAS SAPP, KYM MEHAFFIE and
H.F. PERKINS, *Petitioners*,

v.

THE DAYTON WOMEN'S HEALTH CENTER, INC.,
K. W. DAVIS, MD, and ROBERT SKIPTON, MD,
Respondents.

APPENDIX

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Filed Jan. 15, 1987, at 1:56 p.m.

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO

THE DAYTON WOMEN'S HEALTH CENTER, et al.,	:	CASE NO. 86-3120
Plaintiffs,	:	(Judge John M. Meagher)
v.	:	DECISION, ENTRY & ORDER OVERRULING DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' CLASS ACTION;
DAVID ENIX et al.,	:	CERTIFYING CASE AS CLASS ACTION; AND
Defendants.	:	SUSTAINING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION.

This matter comes before the court on defendants' motion to strike plaintiffs' class action and plaintiffs' motion for preliminary injunction.

The facts indicate that the plaintiffs brought this action in October 1986 claiming that defendants have interfered with plaintiffs' business, staff and patients by engaging in a variety of activities including invasion of privacy, trespass and interference with business

relationships. Plaintiffs pray for injunctive relief and monetary damages.

Defendants move to strike plaintiffs' class action claiming that the requirements of Ohio Civil Rule 23 have not been satisfied. An examination of Rule 23(A) lists the four prerequisites necessary for a class action lawsuit.

> One or more members of a class may sue or be sued as representative parties on behalf of all only if:
> (1) the class is so numerous that joinder of all members is impracticable.

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> (2) there are questions of law or fact common to the class,
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and
> (4) the representative parties will fairly and adequately protect the interests of the class.

In addition, one of the requirements enumerated in Rule 23(B) must be met:

An action may be maintained as a class action if the prerequisites of subdivision (A) are satisfied, and in addition:

> (1) The prosecution of separate actions by or against individual members of the class would create a risk of:
>
> > (a) inconsistent or varying adjudication with respect to individual members of the class which would establish incompatible standards of conduct to the party opposing the class; or
> >
> > (b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudication or substantially impair or impede their ability to protect their interests; or
>
> (2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole...

The Court finds from the evidence that the first

requirement of Rule 23(A) is clearly satisfied inasmuch as on at least two separate occasions, up to seventy-five (75) persons have engaged in picketing activities at the Dayton Women's Health Center. Thus, the class is so numerous that joinder of all members is impractical. Lastly, the Court finds no merit in the contention that

the granting of an injunction against defendant class would be an injunction against the entire world.

The second requirement, that is, that questions of law or fact be common to the class is also clearly satisfied, in light of the many instances involving representatives of the class in acts of trespass, obstruction and interference with the orderly flow of traffic on South Dixie Drive and verbal abuse.

The third and fourth prerequisites of Rule 23(A) are also met. The Court finds no conflict of interest between the representatives of the class and the defendant class itself. Furthermore, the Court finds that the representatives of the class have already, and will continue to, adequately represent the interests of the class.

Finally, it is apparent to the court that the requirement of Rule 23(B)(1) has been satisfied and thus warrants certification of plaintiffs' proposed class. If this matter was allowed to proceed without class certification, separate adjudication could possibly result in prejudice to non-party litigants. In short, all the

requirements necessary to maintain a class action have been satisfied.

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Therefore, in the interest of judicial efficiency and in accordance with the forgoing, defendants' motion to strike plaintiffs' class action is OVERRULED.

Therefore, the Court, pursuant to Rule 23, certifies this matter as a defendant class action whose class consists of:

> all individuals protesting the activities conducted at the Dayton Women's Health Center, 3460 South Dixie Drive, Dayton, Ohio 45439, who have been personally served with this Entry and Preliminary Injunction as well as their officers, agents, servants, employees, attorneys and those persons in active concert or participation with them who receive personal service of the Entry and Preliminary Injunction.

Plaintiffs' motion for preliminary injunction and defendants' opposition to it asks this Court to balance the defendants' constitutional right to free speech and assembly versus plaintiffs' constitutional right to privacy.

Plaintiffs operate the Dayton Women's Health Center which provides various health services including,

but not limited to, therapeutic abortions. Defendant class objects to these services and has conducted various activities at the Center and the offices of the Center's physicians.

The Court, after carefully listening to all the testimony during three days of hearings, has determined that the defendants' conduct includes:

1) interference with the daily business operations of the Health Center including trespass upon the Health Center's

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property,

2) obstruction of the driveway which enters the Health Center's lot, and

3) interference with the flow of traffic on South Dixie Drive.

Therefore, the Court concludes that a preliminary injunction is the appropriate remedy in this matter.

The Supreme Court of the United States has determined that although freedom of speech is highly protected, it is not absolute. In fact, reasonable time,

place and manner restrictions may be enforced providing that such restrictions are narrowly tailored to serve s significant governmental interest, leave open ample alternative channels of communication and are content neutral *United States v. Grace*, 461 U.S. 171 (1983). Therefore, in light of the evidence and balancing the constitutionally protected interests of both parties, the Court ORDERS that the defendant class and the representative defendants, David Enix, Jim Mehaffie, David Mehaffie, Kim Mehaffie, Douglas Sapp and H.F. Perkins are enjoined from:

1) Blocking or interfering with the access or egress of any individual going to or from the Dayton Women's Health Center.

2) Blocking or interfering with the driveway of the Dayton Women's Health Center.

3) Speaking, chanting, yelling or verbally communicating in any manner designed, intended or having the effect of reaching

the staff or patients inside the Dayton Women's Health Center.

4) Trespassing on the property of the Dayton Women's Health Center.

5) Verbal communications, either in person or by telephone, with employees of the Center unless such communications are with the consent of such employees.

6) Picketing at or within viewing distance of the homes of such employees in groups of more than three (3) individuals.

7) Picketing at or within viewing distance of the offices of such employees in groups of more than five (5) individuals.

8) Picketing at or within viewing distance of the Dayton Women's Health Center in groups of more than ten (10) individuals.

The court carefully reviewed the videotapes marked as plaintiffs' exhibits 14 and 15 and reaches the conclusion that serious issues of public safety exist that involve the members of defendant class and drivers and

passengers of vehicles on South Dixie Drive. Two examples which illustrate the problem include the use of large red sign with the letters S-T-O-P and the use of signs urging motorists to honk. Both types of signs could easily confuse a driver or contribute to driver distraction and subsequently result in a collision with other vehicles or the picketers themselves. Accordingly, the Court feels compelled to further enjoin the defendant class and their representatives from

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9) Blocking or interfering with the flow of traffic on, from or to South Dixie Drive.

10) Picketing on the west side of South Dixie Drive.

11) Using any sign larger than four feet in any dimension, including signs resembling traffic safety signs, i.e., stop signs.

12) Using any sign urging motorists to honk.

In accordance with the foregoing, plaintiffs' motion for preliminary injunction is SUSTAINED.

Plaintiffs shall post a copy of this Order in front of the clinic at 3460 South Dixie Drive, Dayton, Ohio 45439. This notice is only an accommodation. Official class notice is by personal service on class members.

No further service of this Order shall be necessary on the representative defendants. For the purpose of this Order, "persons picketing" and a "picket" include persons present in the area referred to in this Order who are carrying protest and informational signs, passing out literature, speaking publicly, or otherwise engaged in activity intended to inform, influence and persuade the public about matters of public interest, including abortion. Service of this Order on such people shall be effected by the Sheriff of Montgomery County. Service documented by videotape will be preferred. Other evidence of service will be acceptable at the option of the Court. Those serving members of the class with this Order shall request the name and address of

of (*sic*) the person served. A person refusing to accept the Order shall be deemed to be served.

The Sheriff of Montgomery County may enforce the terms of this Order.

SO ORDERED:

/s/ John M. Meagher

John M. Meagher, Judge

Copies of this Decision, Entry & Order were served on all parties, as is indicated below, by ordinary mail this filing date:

DAVID GREER/JOHN HAVILAND, Attorneys for Plaintiffs

DAVID HAFFEY, Attorney for Defendants, D. Enix, D. & K. Mehaffie, D. Sapp and H.F. Perkins

JAMES CONDIT, Attorney for Defendant, Jim Mehaffie

CATHY MILLER, Bailiff

MONTGOMERY COUNTY SHERIFF'S DEPARTMENT

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO

THE DAYTON WOMEN'S HEALTH CENTER, et al.,	:	CASE NO. 86-3120
Plaintiffs,	:	(Judge John M. Meagher)
v.	:	DECISION, ENTRY & ORDER OVERRULING DEFENDANTS' MOTIONS TO AMEND PENDANT INJUNCTION;
DAVID ENIX et al.,	:	OVERRULING PLAINTIFFS' MOTION TO MODIFY THE
Defendants	:	PRELIMINARY INJUNCTION; ORDERING DEFENDANTS AND DEFENDANT CLASS PERMANENTLY ENJOINED; AND ORDERING MEMBERS MAY BE ADDED TO DEFENDANT CLASS.

This matter comes before the Court on defendants Jim Mehaffie and David Mehaffie's motions to amend pendant injunction, plaintiffs' motion to modify preliminary injunction, and the parties' request for a permanent injunction on the evidence submitted.

Defendants moves this Court to amend the injunction by incorporating the following:

1. Eliminating the O.R.C.P. 23 "class certification.

2. Eliminate the language "within viewing distance of" as a limitation on the picketing activities at any site.

3. Increase the number of picketers authorized to 20 on each side of South Dixie Drive in front of the Plaintiff Center and increase the number of picketers to 20 at other sites covered by the order.

4. Eliminate all other aspects as to personal conduct except the terms "blocking" or "interfering" in the ingress and egress of any individual going to or from the Plaintiff Center including the driveways of the Center; and, trespassing.

[No. 86-3120, 2]

5. Redefine "picketing" to include only persons who are present in the area and carrying protest and informational signs.

Defendants contend that the current injunction exceeds the Court's jurisdiction and powers and therefore believe that these changes are warranted.

Plaintiffs oppose defendants' motions to amend the injunction. Plaintiffs correctly point out that defendants' memorandum of law in support of defendants' motions contains no discussion but simply lists six cases from foreign jurisdictions of which the first five discuss generally the requirements for certifying a

plaintiff's class action. Notwithstanding the cases cited which discuss certifying class actions, the defendants have cited no legal authority relevant to the issues raised in their motions. Moreover, the defendants have not presented any new evidence or reasons to support the suggested amendments.

In light of the foregoing, defendants' motions to amend pendant injunction are OVERRULED.

Plaintiffs move for an order modifying the preliminary injunction by adding the following:

"it is further Ordered that the Sheriff of Montgomery County, Ohio, or any other law enforcement officer be and he hereby is authorized to arrest for contempt any defendant or member of the defendant class observed violating the terms of the injunctions issued by this Court."

Plaintiffs make this request as an alternative to the cumbersome

[No. 86-3120, 3]

procedure of motions to show cause.

After careful consideration, the Court is satisfied that the current procedure involving motions to show cause, although cumbersome, is the appropriate manner to bring a potential contemner to the Court's attention.

Accordingly, plaintiffs' motion to modify the preliminary injunction is OVERRULED.

Counsel for the parties having submitted this matter to the Court on the evidence presented at the various hearings thus far held, it is ORDERED that the individual defendants and the defendant class previously certified by the Court and consisting of all individuals protesting the activities conducted at The Dayton Women's Health Center, 3460 South Dixie Drive, Dayton, Ohio, who have been personally served with this Entry and Order of Final Judgment or with this Court's Entry and Preliminary Injunction of January 15, 1987, as well as their officers, agents, servants, employees, attorneys and those persons in active concert or participation with them who receive personal service of the Entry and Order of Final Judgment or this Court's Entry and Preliminary Injunction of January

25, 1987, be and they hereby are permanently enjoined from:

1. Blocking or interfering with the access or egress of any individual going to or from The Dayton Women's Health Center;

2. Blocking or interfering with the driveway of The Dayton Women's Health Center;

[No. 86-3120, 4]

3. Blocking or interfering with the flow of traffic on, from or to South Dixie Drive;

4. Using any sign larger than four feet in any dimension, including signs resembling traffic safety signs, i.e., stop signs, or using any sign urging motorists to honk;

5. Speaking, chanting, yelling or verbally communicating in any manner designed, intended or having the effect of reaching the staff or patients or volunteers inside The Dayton Women's Health Center;

6. Trespassing on the property of The Dayton Women's Health Center;

7. Verbal communications, either in person or by telephone, with employees, staff or volunteers of the Center unless such communications are with the consent of such employees, staff or volunteers;

8. Picketing in any form including parking, parading or demonstrating at or within the viewing distance of the homes of patients, employees, staff or volunteers of The Dayton Women's Health Center or of physicians performing services at The Dayton Women's Health Center;

9. Picketing in any form including parking, parading or demonstrating at or within the viewing distance of the offices of physicians performing services at The Dayton Women's Health Center in groups of more than five individuals;

10. Picketing in any form including parking, parading or demonstrating on the west side of South Dixie Drive within the viewing distance of The Dayton Women's Health Center;

11. Picketing in any form including parking, parading, or demonstrating within the viewing distance of The Dayton Women's Health Center at any location other than the sidewalk bordering the east side of Dixie Drive in front of the facility;

12. Picketing in any form including parking, parading, or demonstrating within the viewing distance of The Dayton Women's Health Center in groups of more than ten (10) individuals.

For purposes of this injunction, the term "picketing" includes, but is not limited to, parading, parking or any other form of demonstration. In fact, "picketing" goes to the mere

presence of an individual.

It is further ORDERED that members may be added to the defendant class by effecting service of a copy of this Order on individuals falling within the description of the defendant class by the Sheriff of

Montgomery County, any other law enforcement individual or by any employee of The Dayton Women's Health Center.

The individual effecting such service shall thereafter file in this action a signed Certificate of Service stating the date, time and place of service together with the name and address of the individual upon whom such service was made.

All individuals who are members of the defendant class shall divulge to the individual effecting such service the name and address of any individual upon whom such service is effected, to the extent such information is known. If the name and address of the individual upon whom such service is effected is not known at the time of service, a photograph of the individual may be attached to the Certificate of Service in lieu of such information. Any employee of The Dayton Women's Health Center is hereby authorized to photograph the effecting of any such service.

Counsel should take note that this Decision, Entry and Order is also in the form of a judgment

entry. Therefore, the time for prosecuting an appeal to the Second District Court of Appeals must be computed from the date upon which this decision and entry is filed.

[No. 86-3120, 6]

Costs are to be paid by the defendants.

SO ORDERED:

/s/ John M. Meagher

John M. Meagher, Judge

Copies of this Decision, Entry & Order served on all parties, indicated below, by ordinary mail this filing date:

DAVID C. GREER, Attorney for Plaintiffs

DAVID A. HAFFEY, Attorney for Defendants, D. Enix, D. & K. Mehaffie, D. Sapp, and H.F. Perkins

JAMES J. CONDIT, Attorney for Defendant, James Mehaffie and for Defendant Class

MONTGOMERY COUNTY SHERIFF DEPARTMENT

CATHY MILLER, Bailiff

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO

THE DAYTON WOMEN'S HEALTH CENTER, et al.,	:	CASE NO. 86-3120
Plaintiffs,	:	(Judge John M. Meagher)
v.	:	DECISION, ENTRY & ORDER OVERRULING DEFENDANTS' MOTIONS TO AMEND PENDANT INJUNCTION;
DAVID ENIX et al.,	:	OVERRULING PLAINTIFFS' MOTION TO MODIFY THE
Defendants	:	PRELIMINARY INJUNCTION; ORDERING DEFENDANTS AND DEFENDANT CLASS PERMANENTLY ENJOINED; AND ORDERING MEMBERS MAY BE ADDED TO DEFENDANT CLASS.

This matter comes before the Court on defendants Jim Mehaffie and David Mehaffie's motions to amend pendant injunction, plaintiffs' motion to modify preliminary injunction, and the parties' request for a permanent injunction on the evidence submitted.

Defendants moves this Court to amend the injunction by incorporating the following:

1. Eliminating the O.R.C.P. 23 "class certification.

2. Eliminate the language "within viewing distance of" as a limitation on the picketing activities at any site.

3. Increase the number of picketers authorized to 20 on each side of South Dixie Drive in front of the Plaintiff Center and increase the number of picketers to 20 at other sites covered by the order.

4. Eliminate all other aspects as to personal conduct except the terms "blocking" or "interfering" in the ingress and egress of any individual going to or from the Plaintiff Center including the driveways of the Center; and, trespassing.

[No. 86-3120, 2]

5. Redefine "picketing" to include only persons who are present in the area and carrying protest and informational signs.

Defendants contend that the current injunction exceeds the Court's jurisdiction and powers and therefore believe that these changes are warranted.

Plaintiffs oppose defendants' motions to amend the injunction. Plaintiffs correctly point out that defendants' memorandum of law in support of defendants' motions contains no discussion but simply lists six cases from foreign jurisdictions of which the first five discuss generally the requirements for certifying a

plaintiff's class action. Notwithstanding the cases cited which discuss certifying class actions, the defendants have cited no legal authority relevant to the issues raised in their motions. Moreover, the defendants have not presented any new evidence or reasons to support the suggested amendments.

In light of the foregoing, defendants' motions to amend pendant injunction are OVERRULED.

Plaintiffs move for an order modifying the preliminary injunction by adding the following:

"it is further Ordered that the Sheriff of Montgomery County, Ohio, or any other law enforcement officer be and he hereby is authorized to arrest for contempt any defendant or member of the defendant class observed violating the terms of the injunctions issued by this Court."

Plaintiffs make this request as an alternative to the cumbersome

[No. 86-3120, 3]

procedure of motions to show cause.

After careful consideration, the Court is satisfied that the current procedure involving motions to show cause, although cumbersome, is the appropriate manner to bring a potential contemner to the Court's attention.

Accordingly, plaintiffs' motion to modify the preliminary injunction is OVERRULED.

Counsel for the parties having submitted this matter to the Court on the evidence presented at the various hearings thus far held, it is ORDERED that the individual defendants and the defendant class previously certified by the Court and consisting of all individuals protesting the activities conducted at The Dayton Women's Health Center, 3460 South Dixie Drive, Dayton, Ohio, who have been personally served with this Entry and Order of Final Judgment or with this Court's Entry and Preliminary Injunction of January 15, 1987, as well as their officers, agents, servants, employees, attorneys and those persons in active concert or participation with them who receive personal service of the Entry and Order of Final Judgment or this Court's Entry and Preliminary Injunction of January

25, 1987, be and they hereby are permanently enjoined from:

1. Blocking or interfering with the access or egress of any individual going to or from The Dayton Women's Health Center;

2. Blocking or interfering with the driveway of The Dayton Women's Health Center;

[No. 86-3120, 4]

3. Blocking or interfering with the flow of traffic on, from or to South Dixie Drive;

4. Using any sign larger than four feet in any dimension, including signs resembling traffic safety signs, i.e., stop signs, or using any sign urging motorists to honk;

5. Speaking, chanting, yelling or verbally communicating in any manner designed, intended or having the effect of reaching the staff or patients or volunteers inside The Dayton Women's Health Center;

6. Trespassing on the property of The Dayton Women's Health Center;

7. Verbal communications, either in person or by telephone, with employees, staff or volunteers of the Center unless such communications are with the consent of such employees, staff or volunteers;

8. Picketing in any form including parking, parading or demonstrating at or within the viewing distance of the homes of patients, employees, staff or volunteers of The Dayton Women's Health Center or of physicians performing services at The Dayton Women's Health Center;

9. Picketing in any form including parking, parading or demonstrating at or within the viewing distance of the offices of physicians performing services at The Dayton Women's Health Center in groups of more than five individuals;

10. Picketing in any form including parking, parading or demonstrating on the west side of South Dixie Drive within the viewing distance of The Dayton Women's Health Center;

11. Picketing in any form including parking, parading, or demonstrating within the viewing distance of The Dayton Women's Health Center at any location other than the sidewalk bordering the east side of Dixie Drive in front of the facility;

12. Picketing in any form including parking, parading, or demonstrating within the viewing distance of The Dayton Women's Health Center in groups of more than ten (10) individuals.

For purposes of this injunction, the term "picketing" includes, but is not limited to, parading, parking or any other form of demonstration. In fact, "picketing" goes to the mere

presence of an individual.

It is further ORDERED that members may be added to the defendant class by effecting service of a copy of this Order on individuals falling within the description of the defendant class by the Sheriff of

Montgomery County, any other law enforcement individual or by any employee of The Dayton Women's Health Center.

The individual effecting such service shall thereafter file in this action a signed Certificate of Service stating the date, time and place of service together with the name and address of the individual upon whom such service was made.

All individuals who are members of the defendant class shall divulge to the individual effecting such service the name and address of any individual upon whom such service is effected, to the extent such information is known. If the name and address of the individual upon whom such service is effected is not known at the time of service, a photograph of the individual may be attached to the Certificate of Service in lieu of such information. Any employee of The Dayton Women's Health Center is hereby authorized to photograph the effecting of any such service.

Counsel should take note that this Decision, Entry and Order is also in the form of a judgment

entry. Therefore, the time for prosecuting an appeal to the Second District Court of Appeals must be computed from the date upon which this decision and entry is filed.

[No. 86-3120, 6]

Costs are to be paid by the defendants.

SO ORDERED:

/s/ John M. Meagher

John M. Meagher, Judge

Copies of this Decision, Entry & Order served on all parties, indicated below, by ordinary mail this filing date:

DAVID C. GREER, Attorney for Plaintiffs

DAVID A. HAFFEY, Attorney for Defendants, D. Enix, D. & K. Mehaffie, D. Sapp, and H.F. Perkins

JAMES J. CONDIT, Attorney for Defendant, James Mehaffie and for Defendant Class

MONTGOMERY COUNTY SHERIFF DEPARTMENT

CATHY MILLER, Bailiff

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

THE DAYTON WOMEN'S HEALTH CENTER, ET AL	:	
Plaintiffs-Appellees	:	
vs.	:	CASE NO. 10579
DAVID ENIX, ET AL	:	
Defendants-Appellants	:	

. . . . . .

OPINION

Rendered on the 5th day of December, 1988

. . . . . .

DAVID C. GREER, 400 Gem Plaza, Third and Main Streets, Dayton, Ohio 45402
Attorney for Plaintiffs-Appellees

DAVID A. HAFFEY, 20 King Avenue, P.O. Box 610, Xenia, Ohio 45385
Attorney for Defendants-Appellants

THOMAS E. GROSSMAN, 1800 First National Bank Center, 425 Walnut Street, Cincinnati, Ohio 45202
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RICHARD SAPHIRE, University of Dayton Law School, 300 College Park Drive, Dayton, Ohio 45469
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ELINOR R. ALGER, American Civil Liberties Union of Ohio Foundation, Inc., 360 S. Third Street, Columbus, Ohio 43215

[No. 10579, 2]

Attorney for Amicus Curiae

DOUGLAS W. DAVIS, The National Legal Foundation, 6477 College Park Square, Suite 306, P.O. Box 64845, Virginia Beach, VA 23464
Attorney for Amicus Curiae

. . . . .

WILSON, J.

The plaintiff-appellee, Dayton Women's Health Center, Inc., provides reproductive health services for women including abortions. The other two plaintiffs are K.W. Davis, M.D. and Robert Skipton, M.D. The doctors are employed by the center and each has a private practice in Kettering.

In the fall of 1986, the plaintiffs filed a complaint alleging that the defendants, David Enix, Jim Mehaffie, David Mehaffie, Kim Mehaffie, Douglas Sapp, H.F. Perkins, and other unidentified persons, had engaged in tortious activity which interfered with the delivery of medical service at the center and the private offices of the plaintiff doctors.

The prayer of the complaint was for damages and injunctive relief. The compliant also sought to have the case certified as a defendant class action.

After hearings an entry was filed on January 15, 1987 granting a preliminary injunction and certifying the case as a defendant class action whose class consists of:

> "all individuals protesting the activities conducted at the Dayton Women's Health Center, 3460 South Dixie Drive, Dayton, Ohio 45439, who have been personally served with this Entry and Preliminary Injunction as well as their officers, agents, servants, employees, attorneys and those persons in active concert or participation with them who receive personal service of

> the Entry and Preliminary Injunction."

The trial court found that the defendants' conduct includes:

> 1) interference with the daily business operations of the Health Center including trespass upon the Health Center's property,
>
> 2) obstruction of the driveway which enters the Health Center's lot, and
>
> 3) interference with the flow of traffic on South Dixie Drive.

The trial court then issued a preliminary injunction enjoining the defendant class and the named defendants from:

> 1) Blocking or interfering with the access or egress of any individual going to or from the Dayton Women's Health Center.
>
> 2) Blocking or interfering with the driveway of the Dayton Women's Health Center.
>
> 3) Speaking, chanting, yelling or verbally communicating in any manner designed, intended or having the effect of reaching the staff or patients inside the Dayton Women's Health Center.
>
> 4) Trespassing on the property of the Dayton Women's Health Center.
>
> 5) Verbal communications, either in person or by telephone, with employees of the Center unless

such communications are with the consent of such employees.

6) Picketing at or within viewing distance of the homes of such employees in groups of more than three (3) individuals.

7) Picketing at or within viewing distance of the offices of such employees in groups of more than five (5) individuals.

8) Picketing at or within viewing distance of the Dayton Women's Health Center in groups of more than ten (10) individuals.

9) Blocking or interfering with the flow of traffic on, from or to South Dixie Drive.

[No. 10579, 4]

10) Picketing on the west side of South Dixie Drive.

11) Using any sign larger than four feet in any dimension, including signs resembling traffic safety signs, i.e., stop signs.

12) Using any sign urging motorists to honk.

The order of January 15, 1987 also defined picketing:

> For the purpose of this Order, 'persons picketing' and a 'picket' include persons present in the area referred to in this Order who are carrying protest and informational signs, passing out literature, speaking publicly, or other wise engaged in activity intended to inform, influence and persuade the public about matters of public interest, including abortion.

The preliminary injunction order of January 15, 1987 was thereafter amended in several respects including an order dated February 27, 1987 which provides:

> It is the intention of this Court by this amendment to prohibit any residential picketing/demonstrations until such time the Court may fully review all the evidence presented in the hearing February 27, 1987.

The order of January 15, 1987 was again amended by an entry filed March 16, 1987. This order enjoined the defendants and the defendant class from:

> 1) Picketing in any form including parking, parading, or demonstrating on the west side of South Dixie Drive within the viewing distance of The Dayton Women's Health Center, and
>
> 2) Picketing in any form including parking, parading, or demonstrating within the viewing distance of The Dayton Women's Health Center at any location other than the sidewalk bordering the east side of South Dixie Drive in front of the facility in groups of more than ten (10) individuals.

The order further made clear that picketing goes to the mere presence of an individual.

[No. 10579, 5]

The Court also enjoined all of the defendants from:

> Picketing in any form including parking, parading or demonstrating at or within the viewing distance of the homes of patients of The Dayton Women's Health Center, employees of The Dayton Women's Health Center and physicians performing services at The Dayton Women's Health Center.

In the same order, the court refused to enjoin the defendants from using signs or communications that make any personal reference to patients or employees of the center.

Subsequently the plaintiffs voluntarily dismissed their claims for damages, and all parties then submitted the permanent injunction issue on the evidence presented at the previous hearings.

On July 10, 1987 a final order was filed permanently enjoining the named defendants and the defendant class from:

> 1. Blocking or interfering with the access or egress of any individual going to or from The Dayton Women's Health Center;
>
> 2. Blocking or interfering with the driveway of The Dayton Women's Health Center;

3. Blocking or interfering with the flow of traffic on, from or to South Dixie Drive;

4. Using any sign larger than four feet in any dimension, including signs resembling traffic safety signs, i.e., stop signs, or using any sign urging motorists to honk;

5. Speaking, chanting, yelling or verbally communicating in any manner designed, intended or having the effect of reaching the staff or patients or volunteers inside The Dayton Women's Health Center;

6. Trespassing on the property of The Dayton Women's Health Center;

[No. 10579, 6]

7. Verbal communications, either in person or by telephone, with employees, staff or volunteers of the Center unless such communications are with the consent of such employees, staff or volunteers;

8. Picketing in any form including parking, parading or demonstrating at or within the viewing distance of the homes of patients, employees, staff or volunteers of The Dayton Women's Health Center or of physicians performing services at The Dayton Women's Health Center;

9. Picketing in any form including parking, parading or demonstrating at or within the viewing distance of the offices of physicians performing services at The Dayton Women's Health Center in groups of more than five individuals;

10. Picketing in any form including parking, parading or demonstrating on the west side of South Dixie Drive within viewing of The Dayton Women's Health Center;

11. Picketing in any form including parking, parading, or demonstrating within the viewing distance of The Dayton Women's Health Center at any location other than the sidewalk bordering the east side of Dixie Drive in front of the facility;

12. Picketing in any form including parking, parading, or demonstrating within the viewing distance of The Dayton Women's Health Center in groups of more than ten (10) individuals.

For purposes of this injunction, the term "picketing" includes, but is not limited to, parading, parking or any other form of demonstration. In fact, "picketing" goes to the mere presence of an individual.

The defendants have appealed. They have presented seven assignments of error. The first is:

THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANTS AND ALL PERSONS BY CERTIFYING THE DEFENDANT CLASS AND ISSUING AN INJUNCTION AGAINST ITS MEMBERS.

The order of January 15, 1987 determining that this case may be maintained as a class action was a final appealable order.

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Amato v. General Motors Corp. (1981), 67 Ohio St. 2d 253. No notice of appeal was filed from that order within thirty days as required by App. R. 4(A). We have held that the order determining that a case may be maintained as a class action cannot be reviewed after the time for an appeal from the certification order has expired. *State ex rel. Randolph Storm v. The City of Dayton* (Dec. 21, 1981), Mont. App. No. 7308, unreported.

The first assignment of error is overruled.

The second assignment of error provides:

> THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANTS AND DEFENDANT CLASS MEMBERS BY ISSUING UNCONSTITUTIONALLY VAGUE AND CONTENT BASED RESTRICTIONS ON EXPRESSIVE ACTIVITY.

We agree with the appellants that the trial court recognized that time, place and manner restrictions on

expressive activity must be content neutral to meet constitutional standards. *United States v. Grace* (1983), 461 U.S. 171. However, we disagree with the appellants' assertion that the injunction in this case was a content based restriction simply because its application was limited to the right-to-life advocacy defendants and pro-choice advocates were not so limited. Appellants have cited no authority in support of their view and we have found none. The second assignment of error is overruled.

In their third assignment of error, the appellants state:

> THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANTS AND DEFENDANT CLASS MEMBERS BY ISSUING AN INJUNCTION BASED UPON INADEQUATE FACTUAL FINDINGS WHICH WERE NOT SUPPORTED BY
>
> [No. 10579, 8]
>
> THE RECORD.

Under this assignment of error, the appellants contend that the injunction fails to comply with the

specificity requirements of Civ. R. 65(D). They also contend that the findings of the trial court are contrary to the manifest weight of the evidence.

In our view the record reflects substantial compliance with Civ. R. 65(D) and the findings are supported by competent evidence. *Season Coal Co. v. Cleveland* (1984), 10 Ohio St. 3d 77.

The fourth assignment of error provides:

THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANTS AND DEFENDANT CLASS MEMBERS BY BANNING VERBAL COMMUNICATIONS WITH DWHC EMPLOYEES.

Paragraph 7 of the injunction prohibits the defendants from making "Verbal communications, either in person or by telephone, with employees, staff or volunteers of the Center unless such communications are with the consent of such employees, staff or volunteers."

We agree with the appellants that paragraph 7 is not a time, place, or manner restriction. It in effect prohibits all speech, including public issue speech, in

any forum, including a traditional public forum. This prohibition of protected speech constitutes a prior restraint on speech.

States and courts do not have the power to prohibit peaceful political activity. *NAACP v. Claiborne Hardware Co.* (1982), 458 U.S. 886.

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The United States Supreme Court has repeatedly held that there is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." *New York Times Co. v. Sullivan* (1964), 376 U.S. 254 at 270. This case also makes clear that restrictions in public issue picketing are subject to careful scrutiny.

The fourth assignment of error is sustained.

The fifth assignment of error follows:

THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANTS AND DEFENDANT CLASS MEMBERS BY IMPOSING NUMBERS AND PLACE RESTRICTIONS UPON PICKETING AT THE DWHC AND THE PRIVATE OFFICES OF THE PLAINTIFFS WHICH WERE NOT SUPPORTED BY THE EVIDENCE

AND WHICH ARE
UNCONSTITUTIONALLY
OVERBROAD AND VAGUE.

The appellants under this assignment of error are objecting to what appears to us to be content neutral time, place and manner restrictions.

The fifth assignment of error is overruled. *Akron Women's Clinic v. Right to Life of Greater Akron* (May 14, 1985), summit App. No. 12394, unreported. *Akron Center for Reproductive Health v. North Coast Christian Community* (July 9, 1986), Summit App. No. 12414, unreported.

The appellants sixth assignment of error provides:

THE TRIAL COURT ERRED TO THE
PREJUDICE OF THE DEFENDANTS
AND DEFENDANT CLASS MEMBERS
BY IMPOSING A BAN ON ANY
PICKETING WITHIN VIEWING
DISTANCE OF THE HOMES OF
DWHC'S STAFF AND EMPLOYEES.

The total ban on residential picketing contained in the February 27, 1987 amendment to the preliminary injunction was not

specifically included in the permanent injunction. However, paragraph 8 of the permanent injunction prohibited picketing at or within the viewing distance of the homes of patients, employees, staff or volunteers of the Center. The order further defined "picketing" in broad terms to include "the mere presence of an individual."

The record does not reflect where all of the employees or any of the patients of the center reside. There was testimony that the center has approximately fifty patients per week and that the center has been operating since 1973.

It is reasonably clear that one of the purposes of the injunction in this case was to preserve privacy and tranquility in the home. It is also reasonably clear that speech involved in this case was essentially public issue speech, *i.e.*, speech that participates in the process of representative democracy.

It may be that the mere fact that streets are residential might support more stringent restrictions on public issue picketing than non-residential street;

however, it is "clear that a public street does not lose its status as a traditional public forum simply because it runs through a residential neighborhood." *Frisby v. Schultz* (1988), 101 L.Ed 2d 420.

In *Frisby v. Schultz*, the Supreme Court upheld an ordinance banning "picketing before or about the residence or dwelling of any individual in the Town of Brookfield." Employing the principle that legislation should be given a narrow construction

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so as to avoid constitutional difficulties, the Supreme Court interpreted "picketing" to be "posting at a particular place," to wit: a particular residence. So interpreted, the picketing prohibited by the ordinance would consist of "having the picket proceed on a definite course or route in front of a [particular] home." 101 L.Ed. 2d 431.

General marching through residential neighborhoods, or even walking a route in front of an entire block of houses, was held not to have been prohibited by the ordinance. Id. The significance of this

interpretation of the ordinance was that, as so interpreted, the ordinance permitted the more general dissemination of a message. Only focused picketing taking place solely in front of a particular residence was prohibited. The Supreme Court held that the limited prohibition contained in the ordinance appropriately balanced the picketers' free speech interests with the resident's right to privacy, because it achieved the latter interest without impermissibly infringing the former.

In the case before us, the trial court's express definition of picketing, and the express scope of the restrictions on picketing, are much broader. Picketing is defined in the order to include the dissemination of literature and oral speech, activities not by their nature directed toward a particular residence. The order prohibits picketing, so defined, "at or within the viewing distance of the homes of patients * * *, employees * * * and physicians * * * at The Dayton Women's Health

Center."

By its express terms, the trial court's order is too broad to be saved by a narrowing construction, as in *Frisby v. Schultz.* The general, door-to-door residential campaign, not directed at any particular residence, envisioned in *Frisby* as being an available alternative exercise of free speech rights, is not available in the case before us, since the order, by its express terms, prohibits such activity within viewing distance of the homes of the patients, employees and physicians at the Center, and the defendant has no way of determining where those homes are located.

The injunction in this case in effect prohibits a prudent defendant from public issue picketing on public street in residential areas, and as such, impermissibly infringes upon a prudent defendant's exercise of his First Amendment right of free speech.

The sixth assignment of error is sustained.

The appellants last assignment of error is:

THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANTS AND DEFENDANT CLASS MEMBERS BY IMPOSING VOLUME RESTRICTION UPON THEIR SPEECH WHICH WERE

NOT SUPPORTED BY ITS FINDINGS AND WHICH ARE UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

Paragraph 5 of the injunction prohibits the defendants from "speaking, chanting, yelling or verbally communicating in any manner designed, intended or having the effect of reaching the staff or patients or volunteers inside the Dayton Women's Health

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Center."

This volume restriction of speech is content neutral. It focuses on the manner of expression.

We agree with appellants, however, that as written, paragraph 5 of the injunction is overbroad. It prohibits verbal communications outside the Center that are heard within, even though it is not reasonably foreseeable that they would be heard within. Appellants point out that the Center has been known to open its windows during the summer months.

Faced with otherwise reasonable volume restrictions that it found to be overbroad, the United States Court of Appeals for the Ninth Circuit in a

recent case modified the order consistently with its overbreadth concerns. *Portland Feminist Women's Health Center v. Buhler* (Oct. 6, 1988), 9th Cir. No. 86-4102, 57 U.S.L.W. 2239. We are permitted to do the same in the case before us, by virtue of App. R. 12(A), which provides that a court of appeals may modify the judgment of a trial court. Accordingly, we elect to modify paragraph numbered 5 of the injunction to read as follows:

> 5. Speaking, chanting, yelling or verbally communicating in any manner designed or intended to reach the staff or patients or volunteers inside The Dayton Women's Health Center, or in such a volume that it is reasonably apparent that the communications, are likely to be heard by the staff or patients or volunteers inside The Dayton Women's Health Center.

So modified, the restrictions contained in paragraph 5 are

reasonable.

The last assignment of error is sustained.

The permanent injunction issued July 10, 1987 is amended by amending paragraph numbered 5 as set

forth above, and by deleting paragraphs numbered 7 and 8. As amended, the order is affirmed.

FAIN, J., concurs

KERNS, J., dissenting in part and concurring in part:

While the residential character of a street may support reasonable time, place, and manner restrictions, it is beyond the power of government, including the courts, to completely close a public forum to constitutionally protected first amendment rights. *Frisby v. Schultz*, 101 L.Ed 2d 420. Hence, this case turns upon the reasonableness of the proscriptions contained in the injunction entered by the Common Pleas Court on July 10, 1987.

In balancing the first amendment rights and privacy rights of the plaintiffs and defendants, I have encountered no difficulty with the restrictions imposed by the first, second, third, fourth, sixth, ninth, and twelfth parts of the injunctive order, but in my opinion, the fifth, seventh, eighth, tenth, and eleventh parts of

the injunction are too vague and overbroad to survive constitutional scrutiny. In fact, the notation in the injunction order itself that picketing "goes to the mere presence of an individual" appears to infringe unnecessarily and impermissibly upon free speech.

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Accordingly, I would overrule the first and second assignments of error and sustain the third, fourth, fifth, sixth and seventh assignments of error. Then, pursuant to Civ. R. 65(D), the cause should be reversed and remanded to the trial court for an injunction which describes in detail the acts sought to be restrained and gives specific guidance to the parties to the action.

The Supreme Court of Ohio

1990 TERM

To wit: June 20, 1990

Dayton Women's Health Center et al., Appellees,	:	Case No. 89-221
v.	:	MANDATE
David Enix et al., Appellants.	:	

To the Honorable Court of Appeals

Within and for the County of Montgomery, Ohio.

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the court of appeals is affirmed consistent with the opinion rendered herein.

COSTS:

Motion Fee, $20.00, paid by Melinda Berry.

(Court of Appeals No. 10579)

/s/ Thomas J.Moyer

Thomas J. Moyer
Chief Justice

The Supreme Court of Ohio

1990 TERM

To wit: June 20, 1990

Dayton Women's Health Center et al., Appellees,	:	Case No. 89-221
v.	:	JUDGMENT ENTRY
	:	CERTIFIED BY THE COURT OF APPEALS
David Enix et al., Appellants.	:	

This cause, here on certification of conflict by the Court of Appeals for Montgomery County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is affirmed consistent with the opinion rendered herein.

It is further ordered that the appellees recover from the appellants their costs herein expended; and that a mandate by sent to the Court of Appeals for Montgomery County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Montgomery County for entry.

(Court of Appeals No. 10579)

/s/ Thomas J. Moyer

Thomas J. Moyer
Chief Justice

DAYTON WOMEN'S HEALTH CENTER ET AL., APPELLEES, v. ENIX ET AL., APPELLANTS.

[Cite as Dayton Women's Health Ctr. v. Enix (1990), 52 Ohio St. 3d 67.]

Civil procedure - Class actions-Determination that action shall or shall not be maintained as class action is a final appealable order-Civ. R. 23(C) and App. R. (A).

O.Jur 3d Appellate Review Sec. 64.

An order of a trial court, pursuant to Civ. R. 23(C), determining that an action shall or shall not be maintained as a class action, is a final appealable order, and a party must appeal such an order within thirty days pursuant to App. R. 4(A). (*Amato v. General Motors Corp.* [1981], 67 Ohio St. 2d 253, 21 O.O. 3d 158, 423 N.E. 2d 452, syllabus, approved and followed; *Roemisch v. Mutual of Omaha Ins. Co.* [1974], 39 Ohio St. 2d 119, 68 O.O. 2d 80, 314

[52 Ohio St. 3d 68]

N.E. 2d 386, syllabus, approved and followed; R.C. 2505.02, construed and applied.)

(No. 89-221-Submitted February 14, 1990 - Decided June 20, 1990.)

CERTIFIED by the Court of Appeals for Montgomery County, No. 10579.

The Dayton Women's Health Center, Inc. ("DWHC") is a non-profit corporation located in Dayton, Ohio. The DWHC provides reproductive health care services, including pregnancy tests, pelvic examinations, medical evaluations, and early pregnancy terminations (abortions).

Beginning in June 1986, defendants-appellants, David Enix, Jim Mehaffie, David Mehaffie, H.F. Perkins and other unnamed individuals began picketing at the DWHC. Allegedly, appellants began trespassing, threatening others with violence, and creating excessive noise which interfered with the center's operations. Before the lawsuit was filed, there were as many as seventy persons or more demonstrating at or around the DWHC.

On October 14, 1986, plaintiffs-appellees, Dayton Women's Health Center and its staff doctors, K.W. Davis, M.D., and Robert Skipton, M.D., filed a complaint, later amended, requesting that a preliminary and permanent injunction be issued, as well as damages assessed, against appellants. At that time, appellees moved to have the case certified as a defendant class action.

The trial court then conducted hearing son appellants' motion to strike the class allegations and appellees' motion for a preliminary injunction. On January 15, 1987, the court certified a defendant class defined as "all individuals protesting the activities conducted at the Dayton Women's Health Center * * * who have been personally served with this entry * * * " and issued a preliminary injunction against appellants which included the certified class. Subsequently, on January 22, 1987, the court issued a supplemental

order which detailed a procedure for adding members to the defendant class.[1]

Next, appellees filed a motion to modify the court's injunction in order to conform to certain alleged misconduct by appellants. On March 16, 1987, the court issued its decision and entry supplementing and modifying its original injunctive order.

After the filing of various contempt motions, and motions to dismiss and to compel discovery, the appellees voluntarily dismissed their claims for money damages pursuant to Civ. R. 41(A)(1), and allowed the case to be submitted to the court on their request for a permanent injunction on the evidence submitted at the previous evidentiary hearings. On July 10, 1987, the court issued a decision and entry ordering the

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1 The trial court provided in its supplemental order that "[t]he Dayton Women's Health Center employ the following procedure for adding members to the defendant class:
"1. Any employee of The Dayton Women's Health Center is hereby designated as an agent of this Court for the purpose of personally serving a copy of this Entry and Preliminary Injunction on any individual found to be protesting the activities conducted at The Dayton Women's Health Center. * * * "

appellants, which included the defendant class members, permanently enjoined in accordance

[52 Ohio St. 3d 69]

with the previous orders of the court. In its entry the court also overruled appellants' motion to decertify the class. The appellants, who also represented the defendant class members, then appealed the trial court's decision.

The court of appeals modified and affirmed the permanent injunction, and further held that the defendant class members failed to properly bring an appeal of their class certification. Specifically, the court held the January 15, 1987 order certifying the defendant class was a final appealable order, which required the class members to appeal within thirty days of the certification under App. R. 4(A).

The court of appeals, finding its decision to be in conflict with the decision of the *Court of Appeals for Hamilton County in Planned Parenthood Assn. of Cincinnati, Inc. v. Project Jericho* (June 27, 1986), No.

C-860430, unreported, certified the record of the case to this court for review and final determination.

Bieser, Greer & Landis and *David C. Greer*, for appellees.

Thomas E. Grossmann and *Robert Huffman*, for appellants.

Robert R. Melnick, Kenneth Shaw and *John W. Whitehead*, urging reversal for *amicus curiae*, Rutherford Institute of Ohio.

HOLMES, J. The sole issue certified for our review is whether the certification of a defendant class action is a final appealable order that *must* be appealable within the time allotted under App. R. 4(A).[2] For the reasons which follow, we decide that such class certifications are final appealable orders

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2 Although appellants argue several propositions of law related to the range and extent of the permanent injunction, we choose only to address the sole question certified to us by the court of appeals.

which *must* be appealed within thirty days pursuant to App. R. 4(A).

"Final appealable orders" are defined in R.C. 2505.02, as follow:

"An order affecting a substantial right in an action which in effect determines the action and prevents a judgment, an order affecting a substantial right made in a special proceeding or upon a summary application in an action after judgment, or an order vacating or setting aside a judgment and ordering a new trial is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial. * * *"
(Later amended March 1987.)

This court addressed the issue of the appealability of class certifications in *Amato v. General Motors Corp.* (1981), 67 Ohio St. 2d 253, 21 O.O. 3d 158, 423 N.E. 2d 452, syllabus, by holding that "[a]n order of a trial court, pursuant to Civ. R. 23(C)(1), determining that an action may be maintained as a [plaintiff] class action is a final, appealable order, pursuant to R.C. 2505.02." In deciding that class

certifications are in effect special proceedings under R.C. 2505.02, the *Amato* court announced a balancing test to be applied in theses proceedings:

"This test weighs the harm to the 'prompt and orderly disposition of litigation,' and the consequent waste of judicial resources, resulting from the allowance of an appeal, with the need for immediate review because appeal after final judgment is not practicable." *Id.* at 258, 21 O.O. 3d at 161, 423 N.E. 2d at 456.

Similarly, in *Roemisch v. Mutual of Omaha Ins. Co.* (1974), 39 Ohio St. 2d 119, 68 O.O. 2d 80, 314 N.E. 2d 386, syllabus, this court held that an order denying plaintiff class action status was a final appealable order under

[52 Ohio St. 3d. 70]

R.C. 2505.02, since "such [an] order clearly affects a 'substantial right' of *the class* which 'in effect determines the action and prevents a judgment' adverse or favorable to *the class*." (Emphasis *sic.*) *Id.* at 122, 68 O.O. 2d at 81, 314 N.E. 2d at 388. Therefore, pursuant

to R.C. 2505.02 an appeal will lie directly from an order certifying or denying class action status.

Although *Amato* and *Roemisch* dealt with the appealability of plaintiff class actions, we find little reason not to apply the holding in those cases to defendant class actions. Clearly, the potential plaintiff or defendant will be equally prejudiced in asserting his or her rights in a defendant or plaintiff class action depending on the certification ruling by the trial court. See, *e.g., Planned Parenthood Assn. of Cincinnati v. Project Jericho* (1990), 52 Ohio St. 3d 56, ___ N.E. 2d ___. (Plaintiff requested that defendant class action be certified in order to enjoin the defendant class from engaging in certain conduct.) Usually, defendant class actions are requested in suits seeking injunctive relief under Civ. R. 23 (B)(2) when there are several defendants who have been charged with a common responsibility for implementing or enforcing a particular challenged code provision or who have otherwise acted in common under an industry-wide practice or collective bargaining agreement, or have had some other

interrelationship to one another that bears directly on the challenged conduct in the litigation. 1 Newberg, Newberg on Class Actions (2 Ed. 1985) 133, Section 3.02. Both plaintiff and defendant class actions arise because of the litigation strategies adopted primarily by the plaintiff's counsel under the particular circumstances. Furthermore, "[w]hether the action is claimed to be a class action is solely of plaintiff's choosing, although the defendant may request class treatment in unusual circumstance." Alpert, Class Action Manual (National Consumer Law Center 1977) 190, quoted in Newberg on Class Actions, *supra*, at fn. 23.

Appellants assert that although a class determination is a final appealable order, "an immediate appeal from an order certifying a defendant class is permissive, not mandatory." We disagree. Ohio's App. R. 4(A) states in pertinent part that: "In a civil case the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within thirty days of the date of the entry of the judgment *or order appealed from.* *

* *" (Emphasis added.) Clearly, App. R. 4(A) requires that an appeal be filed within thirty days of a final appealable order.[3] Thus, an order of a trial court, pursuant to Civ. R. 23(C), determining that an action shall be maintained as a class action, is a final appealable order, and a party must appeal such an order within thirty days of the date of entry pursuant to App. R. 4(A).

In the case *sub judice* appellants failed to appeal the January 15, 1987 certification of the defendant class. Instead, they chose to appeal the propriety of the certification on July 10, 1987, when the trial court issued a decision and entry permanently enjoining the defendant class members. Consequently, appellants waived their right to challenge the class certification on appeal.[4]

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3 We recommend that the rules Advisory Committed appointed by this court review whether an amendment to App. R. 4(A) should be adopted in order for a party to have the option of appealing an interlocutory final appealable order after final judgment is rendered in a case.

4 Under App. 3(A) the court of appeals is permitted to dismiss cases where appellants have failed to timely file their appeals. App.R.3(A) provides: "An appeal as

Therefore, for the foregoing reasons, the decision of the court of appeals is affirmed as to the issue on certification.

Judgment affirmed.

MOYER, C.J., WRIGHT and H. BROWN, JJ., concur.

H. Brown, J., concurs separately.

Sweeney, Douglas and *Resnick*, JJ., dissent.

H. BROWN, J., concurring. I join the syllabus and opinion. An order certifying a class action, if it affects a substantial legal right, qualifies as a special proceeding under R.C. 2505.02 and is thus appealable. This was the holding in *Amato v. General Motors Corp.* (1981), 67 Ohio St. 2d 253, 21 O.O. 3d 158, 423 N.E. 2d 452. That decision has stood for nine years and has neither

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of right shall be taken by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal.

undermined the stability of the law nor bred great confusion. I am not prepared to overrule *Amato*.

I write separately because I believe the Ohio law with respect to final appealable orders presents a dilemma when applied to class action issues. If the order certifying a class action is not immediately appealable, the results of a protracted, complex trial (which class actions usually are) could by nullified by an error in the certification which bears no relationship to the validity of the claims of class members (perhaps numbering into the thousands) on the merits.

On the other hand, if certification orders are immediately appealable, an appeal could be used as a tool to delay proceedings.

There is the further problem presented by amendments to class certification. Each time a modification is made to a class order, is that appealable? I do not read today's decision as a definitive resolution of all appealability questions which may arise from class action determinations.

The problem, as applied to class actions, stems from the requirement in Ohio that an order be classified as appealable (in which case an appeal must be taken or lost) or nonappealable (in which case no appeal may be taken) regardless of the desirability of having the issue determined before the resources of the parties and the court are expended on the merits.

What is needed is a rule which would make immediate appeals of class certifications permissible but not mandatory. Discretion should be given to the trial judge to determine when the interests of justice and judicial economy will be served by review of a class action order before launching into the trial on the merits.

Such an approach is permitted in the federal courts. Federal district courts may certify for appeal to the courts of appeals an order certifying a class, pursuant to Section 1292, Title 28, U.S. Code, which states in part:

"(b) When a district judge, in making in a civil action an order no otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may

[52 Ohio St. 3d. 72]

materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

Other states have adopted rules which attempt to solve the peculiar "appealability" problems presented in class actions. See, *e.g.*, Ar. App. R. 2(a)(9); Ga. Ct.

App. R. 29; Ill. Supreme Court Rule 308; Ind. App. R. 4(B)(6); and Tex. App. R. 43(a).

I urge the consideration of a rule in Ohio which would avoid the necessity of choosing between the positions taken in today's case by the majority and dissenting opinions. Until such time as a rule change is accomplished, however, I believe that we should adhere to precedent and that orders certifying a class action are appealable under the "special proceeding" language of R.C. 2505.02.

DOUGLAS, J., dissenting. *Amato v. General Motors Corp.* (1981), 67 Ohio St. 2d 253, 21 O.O. 3d 158, 423 N.E. 2d 452, was improperly decided by this court and the majority's continued reliance upon it breeds confusion and promotes uncertainty in an area of law which is in great need of clarification and stability. In my judgment, *Amato* should be overruled, and I stand ready to do so.

R.C. 2505.03(A) states, in relevant part, that "[e]very final order * * * may be reviewed on appeal * * *."

R.C. 2505.02[5] defines what types of orders are final: (1) an order affecting a substantial right in an action which in effect determines the action and prevents a judgment; (2) an order affecting a substantial right made in a special proceeding or made upon summary application after judgment; or (3) an order vacating or setting aside a judgment or granting a new trial. See *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St. 3d 86, 87-88, 541 N.E. 2d 64, 67. The issue presented in the case at bar concerns only the *second* part of R.C. 2505.02 - an order affecting a substantial right made in a *special proceeding* or made upon summary application after judgment.

The court in *Amato* announced a "balancing test" to be utilized in determining whether an order is made in a "special proceeding." The balancing test "* * *

5 R.C. 2505.02 provides in relevant part:

"An order that affects a substantial right in an action which in effect determines the action and prevents a judgment, an order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment, or an order that vacates or sets aside a judgment or grants a new trial is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial."

weighs the harm to the 'prompt and orderly disposition of litigation,' and the consequent waste of judicial resources, resulting from he allowance of an appeal, with the need for immediate review because appeal after final judgment is not practicable." *Id.* at 258, 21 O.O. 3d at 161, 423 N.E. 2d at 456. Certainly, this court can devise a definition for "special proceeding" which will not depend upon which way the *Amato* scale of justice tips on any given day. The *Amato* balancing test is comprised of nothing

[52 Ohio St. 3d. 73]

more than meaningless verbiage to the practicing attorney who has received an order and must decide whether or not to file a notice of appeal.

According to *Amato*, a proceeding is defined as "special" (or not "special") only when a majority of a reviewing court finds that the balance tips in favor of review, and when the reviewing court is a court of appeals even that decision can be changed by this court on appeal. If the balance tips in favor of review, any order affecting a substantial right which was rendered in

a civil proceeding is a final appealable order which must be appealed within thirty days.[6] What about members of the bar in this state who never timely file notices of appeal regarding an order made in a proceeding thinking all the while that the Amato balancing test would tip in one direction and then, sometime thereafter, a reviewing court rules that the proceeding was "special"? The answer is, of course, that appeal rights are forever lost and colorable claims for malpractice arise. Hence, there are two lessons to be learned from *Amato*. First, every order that affects a substantial right in *any* proceeding should immediately be appealed since what may be defined as an order made in a "special proceeding" may change day to day under *Amato*. In this vein, Amato makes the filing of a notice of appeal like attempting to shoot a moving target. The other lesson *Amato* teaches us is that the payment of malpractice insurance premiums for practicing attorneys is essential.

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6 See App. R. 4(A).

In my judgment, this court should strive to promote clarity and stability in the law. Today's majority opinion simply runs afoul of these notions by relying on *Amato*.

The General Assembly has determined that orders affecting a substantial right made in a "special proceeding" are final orders which may be appealed. On occasion, this court has made certain proceedings "special proceedings" regardless of whether the given proceeding was "special" at all. Today, the majority takes what may be the ultimate step in this dangerous direction.

A "special" proceeding is a proceeding which is unusual or extraordinary. See *e.g.*, Black's Law Dictionary (5 Ed. 1979) 1253. In *State v. Thomas* (1980), 61 Ohio St. 2d 254, 15 O.O. 3d 262, 400 N.E. 2d 897, paragraph one of the syllabus, this court held that denial of a motion to dismiss a criminal charge, based upon a claim of double jeopardy, is a special proceeding. This court has also granted a party the right to immediately appeal an adverse ruling on a

discovery matter, as an order made in a special proceeding. See *Humphrey v. Riverside Methodist Hospital* (1986), 22 Ohio St. 3d 94, 22 OBR 129, 488 N.E. 2d 877. Now the majority of this court holds that an order, pursuant to Civ. R. 23, *granting* class action status is an order made in a special proceeding.

There is absolutely nothing "special" about proceedings under the Rules of Criminal or Civil Procedure. There is nothing unusual or extraordinary about proceedings that are a part of our everyday civil or criminal practice.[7]

As I have stated on a previous occasion, I believe that:

"A special proceeding is an action

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not recognized at common law or part of our standard civil practice. It is one that has been brought about by specific legislation which creates a special type of action.

7 For an additional case, *not* based on either the Civil or Criminal Rules, creating yet another exception to the final appealable order rule, see *Tilberry v. Body* (1986), 24 Ohio St. 3d 117, 24 OBR 308, 493 N.E. 2d 954.

Examples would be forcible entry and detainer, declaratory judgment, appropriation or * * * arbitration." *Stewart v. Midwestern Indemn. Co.* (1989), 45 Ohio St. 3d 124, 128, 543 N.E. 2d 1200, 1204 (Douglas, J., dissenting).

Therefore, a special proceeding is an action: (1) which has been brought about by specific legislation creating a special type of action; (2) *and is either* (a) not recognized at common law, *or* (b) not part of our standard civil (or criminal) practice. An order *granting* certification of a defendant (or plaintiff) class does not meet this definition.

Class actions are governed by Civ. R. 23. Civ. R. 23 was created not by specific legislation but, rather, was adopted in Ohio by legislative inaction. See Section 5(B), Article IV, Constitution. As such, a class action proceeding is not a special proceeding. Further, merely for purposes of discussion, the class action proceeding in question *is* part of our standard civil practice and a proceeding in the nature of granting certification of a defendant class *did* exist at common law in the form of

equitable bills of peace.[8] Accordingly, the proceeding in question not only fails the first prong of the special

8 At common law, a bill of peace could be sought to avoid a multiplicity of legal actions. The bill provided a mechanism in which similar claims asserted by a plaintiff against a multitude of defendants could be determined in one equity suit. See 1 Pomeroy Equity Jurisprudence (5 Ed. 1941), Sections 245 *et seq*; Chafee, Bills of Peace With Multiple Parties (1932), 45 Harv. L. Rev. 1297 ("The King of Brobdingnag gave it for his opinion that, 'whoever could make two ears of corn, or two blades of grass to grow upon a spot of ground where only one grew before, would deserve better of mankind, and do more essential service to his country than the whole race of politicians put together.' In matters of justice, however, the benefactor is he who makes one lawsuit grow where two grew before. A potent device for this purpose is the bill of peace in equity."); and 27 American Jurisprudence 2d (1966) 574-575, Equity, Section 51.

The granting of the bill of peace would, in effect, result in the joinder of multiple defendants and the plaintiff's claims against all defendants could be maintained in one consolidated lawsuit. The granting of a bill of peace was, therefore, much like the granting of certification of a defendant class. See Civ. R. 23. Indeed, it has been said that Fed. R. Civ. P. 23 is a product of the equitable bill of peace:

"* * * Defendant class actions have a long and rich history in English common law. The earliest class actions, or bills of peace in the nature of class actions, brought in English Chancery Courts of the seventeenth and eighteenth centuries were largely defendant class actions in which the plaintiff needed to join numerous parties defendant in order to receive an effective remedy.* * *"

"Defendant class actions have a long history in the United States. As early as 1853, the Supreme court

proceeding test outlined above (which is dispositive of the matter) but also fails both alternative parts of the second prong.

I agree with today's majority that the *denial* of a class certification is ap-

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pealable as a final order. In my view, the issue concerning the denial of class certification was not properly before this court given the facts of the case *sub judice*, but I pass judgment on the issue only to clarify the distinction between *granting* and *denying* class certification.

As indicated, there are three types of orders which are final. An order *granting* or *denying* class certification is not a final order of the second type (an

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in *Smith v. Swormstedt* [(1853), 57 U.S. (16 How.) 288] upheld an action by a plaintiff class against a defendant class noting the well-established common law rule which permits such class suits. Authority for plaintiff and defendant classes was codified in Federal Equity Rule 38, recodified in Federal Rule of Civil Procedure 23, and carried forward to current Rule 23 in the 1966 amended version." (Footnotes omitted.) Newberg, 1 Newberg on Class Action (2 Ed. 1985) 373-375, Section 4.45.

order affecting a substantial right made in a special proceeding) because such an order is made in a proceeding which is not "special." Nor is an order *granting* class certification a final order of the first type (an order affecting a substantial right in an action which in effect determines the action and prevents a judgment). An order allowing a lawsuit to be maintained as a class action does not determine the action or prevent a judgment. The order simply does neither but, rather, the order granting class status is a necessary step to a final determination of the class action lawsuit.

Conversely, an order *denying* class certification is a final order of the *first* type because the order affects a substantial right of the class and in effect determines the action and prevents a judgment for the class. See *Roemisch v. Mutual of Omaha Ins. Co.* (1974), 39 Ohio St. 2d 119, 122, 68 O.O. 2d 80, 81, 314 N.E. 2d 386, 388. Therefore, an order *denying* class certification is a final order of the *first* type, but not the second;

whereas, an order *granting* class certification is not a final order of either the first or second type.

Finally, even if I were to accept the balancing test of *Amato* as a determinant of whether a given order is made in a special proceeding, I believe that the test as applied to orders granting class certification balances in favor of no immediate review. If an order granting class certification is immediately appealable, the class action lawsuit may never be finally litigated. A certification order can be altered, amended, modified or vacated and each change in the class or creation of a new subclass would result, if objected to, in numerous new appeals. Delays in the class action lawsuit could last indefinitely. Such delays and the consequent waste of judicial resources, if the class is decertified or the order is vacated, weigh heavily against permitting immediate appeals. On the other hand, review after final judgment is practicable, in that it would promote the prompt and orderly disposition of the litigation, and far fewer judicial resources would be used, with none being wasted.

For the foregoing reasons, I dissent.

SWEENEY, J., concurs in the foregoing dissenting opinion.

ALICE ROBIE RESNICK, J., dissenting. I respectfully dissent from the majority's holding that an order, "pursuant to Civ. R. 23(C) determining that an action *shall* or *shall not* be maintained as a class action, is a final appealable order * * *." (Emphasis added.) A ruling that an action may be maintained as a class action is totally different from the denial of certification. Hence, I cannot initially accept that they both should be treated the same on the issue of appealability as final orders.

The majority bases its holding on *Amato v. General Motors Corp.* (1981), 67 Ohio St. 2d 253, 21 O.O. 3d 158, 423 N.E. 2d 452, wherein it was held that certification affects a substantial right and is made in a special proceeding. I agree that class certification affects a substantial right. However, I do not agree that

it is done in a "special proceeding." Additionally, I can find no

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support for such a holding concerning class certification either in Ohio or other jurisdictions.

Recently this court determined that an order in a declaratory judgment action pursuant to R.C. Chapter 2721 affected a substantial right in a special proceeding in *General Acc. Ins. Co. v. Insurance Co. of North America* (1989), 44 Ohio St. 3d 17, 540 N.E. 2d 266. However, a declaratory judgment is an independent action determining legal rights. This is not the case with certification of a class action, which is a preliminary procedure. To term a preliminary procedure provided by rule a special proceeding would consequently have broad ramifications and open the door to a flood of piecemeal appeals.

Consequently, if class certification is not a special proceeding, in order for it to be a final order, we must consider the remaining criteria found in R.C. 2505.02 which define final orders other than ones made in

special proceedings. R.C. 2505.02 defines "final order" as including "[a]n order that affects a substantial right in an action which in effect determines the action and prevents a judgment * * * ." Class certification does neither. We simply have to look to Civ. R. 23(C)(1), which provides as follows:

"As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision *may be conditional, and may be altered or amended before the decision on the merits.*" An order which may be changed or modified is interlocutory.

"* * * An interlocutory judgment is provisional or preliminary; it is made before a final decision, for the purpose of ascertaining a matter of law or fact preparatory to a final judgment, or it determines some preliminary or subordinate point or plea, or settles some step, question, or default arising in the progress of the cause, but does not adjudicate the ultimate rights of the parties or finally put the case out of court.

* * * For some purposes, a judgment is not regarded as final until expiration of the period which the judgment remains *within the inherent power of the court to modify or vacate* * * *." (Footnotes omitted; emphasis added.) 47 American Jurisprudence 2d (1969) 123-124, Judgments, Section 1053.

From this it can be seen that certification of a class neither determines the action nor prevents a judgment. At any time during the proceedings the court can decertify part or all of the class. It would be wholly inconsistent with a considerable line of cases to hold that if a party opposing certification does not appeal within thirty days of certification its right to appeal is lost. The reason is that at any time during trial of the certified class action the court may change its previous order. There would be no reason for a party to attempt an appeal from such an obviously interlocutory order.

Other jurisdictions have held that certification of a class action is not immediately appealable. The court

in *Pincus v. Mut. Assurance Co.* (1974), 457 Pa. 94, 321 A. 2d 906, stated:

"We note at the outset that an order permitting a suit to proceed as a class action is not only an interlocutory order, but also that it is the type of interlocutory order which is not usually appealable. *Piltzer v. Independence Federal Savings and Loan Association*, 452 Pa. 402, 319 A. 2d 677 (1974). *See also Thill Securities Corp. v. New York Stock Exchange*, 469 F.2d 14, 17 (7th Cir. 1972); *Walsh v. Detroit*, 412 F.2d 226 (6th Cir. 1969); 9 J. Moore, Federal Practice 110.13[9], at 184-87 (2d Ed. 1973)." *Id.* at 96-97, 321 A. 2d at 908.

"Since the appellants' claim is, in

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reality, an objection to the propriety of the class action, it can properly be resolved on appeal after final judgment below. To hold otherwise would encourage piecemeal determinations and consequent protraction of litigation. *Piltzer, supra.*" *Id.* at 98, 321 A. 2d at 909.

Arizona has a statute similar to Ohio's as to final judgments. Section 12-2101, Ariz. Rev. Stat. Additionally, Arizona R. Civ. P. 23(c)(1) is identical to Ohio's in that it provides that such an order "may be altered or amended before the decision on the merits." Arizona has also held that denial of a motion for decertification of a class is an interlocutory order and cannot be immediately appealed since it neither determines the action nor prevents a judgment. See *Eaton v. Unified School Dist. No. 1 of Pima Cty.* (App. 1979), 122 Ariz. 391, 595 P. 2d 183, affirmed (1979), 122 Ariz. 377, 595 P. 2d 169.

This court in *Roemisch v. Mutual of Omaha Ins. Co.* (1974), 39 Ohio St. 2d 119, 68 O.O. 2d 80, 314 N.E. 2d 386, held in the syllabus that: "An order of a trial court, pursuant to Civ. R. 23(C)(1), determining that an action may not be maintained as a class action is a final, appealable order, pursuant to R.C. 2505.02." Other jurisdictions have similarly held that denial of class certification is final. See *Darr v. Yellow Cab Co.* (1967), 67 Cal.2d 695, 63 Cal. Rptr. 724, 433 P. 2d 732

(the California Supreme Court concluded that a class action termination order was in legal effect a final judgment from which an appeal lies); *Reader v. Magma-Superior Copper Co.* (1972), 108 Ariz. 186, 494 P.2d 708; *McConnell v. Commonwealth of Pennsylvania, Dept. of Rev.* (1983), 503 Pa. 322, 469 A. 2d 574; *In re Estate of Freedman* (1982), 307 Pa. Super. 413, 453 A. 2d 651. The reasoning that such orders are final is usually based upon the "death knell" theory which was rejected in *Coopers & Lybrand v. Livesay* (1978), 437 U.S. 463, 477, wherein the court stated that:

"Accordingly, we hold that the fact that an interlocutory order may induce a party to abandon his claim before final judgment is not sufficient reason for considering it a 'final decision' within the meaning of 1291 [, Title 28, U.S.]." Thus, this issue was settled in the federal courts. The *Livesay* decision also commented on the fact that under Fed. R. Civ. P. 23 (c)(1) an order involving class status may be "altered or amended before the decision on the merits." *Id.* at 469,

fn. 11. Even if a *denial* of certification of a class were immediately appealable on the basis that the denial prevented a judgment and was a death knell to the action, there is no basis for similar treatment of a *grant* of certification.

In the instant case the trial court certified the class of defendants. The defendants proceeded with the case and did not attempt to seek an immediate appeal. The majority now chooses to affirm the dismissal of defendants' appeal, relying on the holding of *Amato, supra.*

If we were to accept that class certification is a special proceeding we still would not have a final appealable order since the trial court pursuant to Civ. R. 23(C)(1) may change its order of certification at any time prior to a decision on the merits. Such an order is clearly interlocutory and cannot be considered a final appealable order under R.C. 2505.02. It is interesting to note that an Illinois Supreme Court Rule succinctly

accomplishes what this court is trying to do through case law.[9]

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To allow this appeal now is for this court to engage in judicial legislation. R.C. 2505.02 was never intended to apply to actions such as the one before this court.

Based upon the foregoing, I would allow the appellant the right to raise the issue of class certification and would decide this issue upon the merits.

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9 The Illinois Supreme Court has adopted Supreme Court Rule 308 which allows interlocutory appeals in certain circumstances.

"Interlocutory Appeals by Permission

"(a) Requests. When the trial court, in making an interlocutory order not otherwise appealable, finds that the order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the court shall so state in writing, identifying the question of law involved. Such a statement may be made at the time of the entry of the order or thereafter on the court's own motion or on motion of any party. The Appellate Court may thereupon in its discretion allow an appeal from the order." Cf. Section 1292(b), Title 28, U.S. Code.